part Waterworks Co. v. *Potter*, 7 H. & N. 160; *Pennington* v. *Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769.

The reason in one and all is the same, he must not allow such things to escape from his own control and premises to another's detriment. Whether positive negligence must be proved in any or all the above illustrations is immaterial upon the precise point we are now considering.

The true cause of action therefore in *Ballard* v. *Tomlinson*, is not exactly that the defendants contaminated underground percolating water, but that he allowed his impure sewage to escape from his premises to the plaintiff's, and the circumstance that it reached there by underground percolation instead of by a surface stream is quite immaterial. The mode of transmission is unimportant. In this view of the case the decision in *Ballard* v. *Tomlinson* is clearly right, and quite in harmony with well-established principles on both sides of the Atlantic.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Texas.

THE "EXPRESS" PRINTING CO. *v.* JOHN H. COPELAND.

When one becomes a candidate for public office, conferred by popular election, he is considered as putting his character in issue, so far as respects his qualifications for the office. Whatever pertains to the qualifications of the candidate for the office sought is a legitimate subject for discussion and comment, but statements and comments made must be confined to the truth, or what, in good faith and upon probable cause, is believed to be true, and the matter must relate to the suitableness or unfitness of the candidate for the office.

If the matter published be true, and is justified by the occasion, the candidate cannot recover against the publisher. If the matter be not justified by the occasion, then, whether true or false, the publisher is not relieved from liability, because the party was a candidate for public office; though the matter may be justified by the occasion. If it be false, a right of action accrues against the publisher, to defeat which the burden would be on him to show that publication was made in good faith, in the honest belief of its truthfulness, and that there were just and reasonable grounds for entertaining that belief.

In suits for libel, when defendant has asserted several inconsistent pleas in his answer, *inter alia*, one justifying by asserting the truth of the alleged libellous matter, the failure to establish such plea is not to be taken as tending to establish malice, and to aggravate the injury done defendant.

APPEAL from Bexar County.

This suit was brought by appellee against appellant, alleging that on January 7th 1883, appellee was a candidate for mayor of the city of San Antonio, the election for which was had January 8th 1883; that appellant published in its newspaper, the "San Antonio Express," a false, wicked and malicious libel, with the intent, and for the purpose of injuring him, to wit:

"As Mr. Copeland is a candidate for mayor, and as that officer has the general management of our finances, it is a legitimate question for the people to ask how he has managed affairs of others heretofore placed in his hands. We know very little of such transactions, though the records show one case that may give some valuable hints to the voters. We will state the facts, allowing the reader to make his own comments: In 1881 T. P. Aplin died, and Mr. Copeland was appointed administrator of his little estate, the total valuation of which was $2579.90. The administration was closed November 23d, and the report shows a total expense of administering on the estate of $2579.90 to have been $882.28, and the administrator was allowed to retain the balance of the estate $1777.62, subject to the order and instruction of the heirs. What such retention cost the heirs we do not know, but from the charges for administration it was doubtless a pretty heavy one. The heirs, no doubt, were afraid to give any instructions through fear that the balance of the estate would not pay the fees accruing for the money left in the administrator's hands."

Appellant answered by general and special exceptions and general denial, and specially denied the meaning attributed to the statement of appellee, and also that appellant published the statement believing it to be true; that the facts were furnished by others, who assured the appellant of their truth, and that the same was published in good faith, without any malice or ill-will against appellee, and under the honest belief that it was matter that was proper to be made known in view of appellee's candidacy for the office of mayor.

A trial had December 24th 1883, resulted in a verdict and judgment for $2500, from which this appeal is prosecuted.

Simpson & James and *Shook & Dittmar*, for appellant.

J. H. McLeary, for appellee.

WATTS, J.—Elsewhere the rule seems well established that in this class of cases, where the defendant justifies by alleging the truth of the libellous matter, and fails to establish the truth of the plea, this may be considered as a circumstance tending to show malice. But our statute gives the defendant the right to plead in his answer, as many several matters, whether of law or fact, as he may deem necessary to his defence, and which are pertinent to his cause, pro-

vided that he shall file them all at the same time, and in the due order of pleading.

In *Fowler* v. *Davenport*, 21 Texas 633, in construing that provision of the statute, Justice ROBERTS remarks that "the general and absolute right here given to plead several matters is unlimited, if they are pertinent to the cause, filed all at the same time, and in the due order of pleading. There is no qualification or abridgment of this right in matters that are inconsistent. Such a qualification would destroy the right." The conclusion reached in that case was that one plea could not be used as evidence, or as an admission for the purpose of destroying another inconsistent plea contained in the same answer.

It would seem, therefore, that in this character of suits where the defendant has asserted several inconsistent pleas in the same answer, and among them one justifying, by asserting the truth of the supposed libellous matter, to permit that plea to be taken as a circumstance tending to establish malice, on the ground that the plea was not sustained by the evidence, when probable cause of the non-existence of malice has been asserted in the answer, and is pertinent to the cause, would, in the language of Justice Roberts, "destroy the right."

Here the court instructed the jury that appellant had pleaded the truth of the publication in justification, and if the truth of the publication had not been established by the evidence, then to consider the fact of its having been pleaded as a circumstance tending to show malice, and to aggravate the injury done to plaintiff. There exist two fatal objections to this instruction. First, there is no plea contained in the answer asserting the truth of the publication, as a defence: Townshend on Slander and Libel, sect. 357.

In the second place appellant had asserted by plea, that the publication was privileged, and made upon probable cause in good faith and without malice, so that in either view the charge is erroneous.

With respect to the question of privilege asserted by the answer, there is considerable confusion found in the adjudicated cases. Judge COOLEY, in his work on Torts, p. 217, says, "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public is concerned. With this end in view, not only must

freedom of discussion be permitted, but there must be exemption afterwards from liability for any publication made in good faith, and in the belief of its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for public office, either to the electors, or to a board of officers having power of appointment."

It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue, so far as respects his qualification for the office: *Com.* v. *Clap*, 4 Mass. 169; *Com.* v. *Odell*, 3 Pitts. (Pa.) 449; *Rearick* v. *Wilcox*, 10 West. Jur. 681; Odgers on Slander and Libel, sect. 236.

Whatever pertains to the qualification of the candidate for the office sought, is a legitimate subject for discussion and comment, provided such discussion and comment is not extended beyond the prescribed limit; that is, all statements and comments in this respect must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the issue; *i. e.*, it must relate to the suitableness or unfitness of the candidate for the office.

In our form of government, the supreme power is in the people; they create offices and select the officers. Then, in the exercise of this high and important power of selecting their agents to administer for them the offices of government, are the people to be denied the right of discussion and comment respecting the qualification, or want of qualification of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought? Usually it is by such discussion and comment concerning the qualification of opposing candidates that the people obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgment of this right of discussion and comment, beyond the limitations heretofore stated, it seems to us would be extremely unwise.

And in this respect the press occupies the same position, and should be included in the same category with the people. Public journals are supported by and are published with a view to the dissemination of useful knowledge among the people, and the comments

and discussions of these journals are entitled to the same privileges and subject to the same limitations respecting the qualifications and suitableness of candidates for office, as those of the people.

Chief Justice WILLIE, in *Belo & Co.* v. *Wren*, 5 Texas Law Review 153, truly remarked that every "facility should be allowed for the quick dissemination of useful facts, and the freedom of the press should not be restrained further than is absolutely necessary to protect private character from falsehood and slander."

It is implied by the rule announced by us that the matter published must be such as is justified by the occasion; that is, it must be such as would be appropriate for the electors to consider in making a selection for the office. Ordinarily that would be a question of fact, to be submitted to the jury by appropriate instructions.

Then, if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office, would not exempt the publisher from liability, whether the matter published was true or false. And although the matter published might be justified by the occasion, still, if it was false, a right of action would accrue against the publisher to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and besides that there were just and reasonable grounds for entertaining that belief.

While the rule here announced seems to be just to all, we are aware of the fact that it is not in accord with some, and perhaps a majority of the adjudicated cases in this country. In New York comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons. The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason, and not merely in accord with the spirit of constitutional liberty and free republican institutions.

Our conclusion is that the judgment ought to be reversed and the cause remanded. Reversed and remanded.

The authorities upon the important and interesting question discussed in the principal case are not so harmonious as could be wished. In New York the rule

upon the subject is most unsatisfactory, and it is in effect held by the courts of that state that there is no privilege whatever possessed by the elector in canvassing the character and qualifications of a candidate for his suffrage beyond that which is possessed in any other relation. In the case of *Lewis* v. *Few*, 5 Johns. 1, the chairman of a public meeting signed an address adopted by the meeting, condemning the conduct of the governor, Morgan Lewis, then a candidate for re-election, which among other things charged him with want of fidelity to his party, pursuing a system of family aggrandizement in his appointments, signing the charter of a bank, knowing that it had been procured by fraud, attempting to destroy the freedom of the press by vexatious prosecutions, &c. In an action against the chairman for the libel contained therein, no attempt was made to prove the truth of the charges, and it was held by the Supreme Court that the publication was not privileged. Mr. Justice THOMPSON, in delivering his opinion, among other things, used this language: "That electors should have a right to assemble and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinion to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct, specific and unfounded crimes. It would in my judgment be a monstrous doctrine to establish that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes with impunity. Candidates have rights as well as electors, and these rights and privileges must be so guarded and protected as to harmonize one with another. If one hundred or one thousand men, when assembled together, undertake to charge a man with specific crimes, I see no reason why it should be less criminal than if each one should do it individually at different times and places. All that is required, in the one case or the other, is not to transcend the bounds of truth."

A like doctrine was laid down in the case of *King* v. *Root*, 4 Wend. 113; s. c. 7 Cow. 613, which was an action by the lieutenant-governor, against the defendant for charging him with being intoxicated in the senate chamber as he was about to take his seat as presiding officer. The defendant upon the trial brought a number of witnesses who testified to the truth of the charge, which also appeared to have been published in the full belief of its truth; but the jury found against the defendant, and under an instruction that the only privilege the defendant had was simply to publish the truth and nothing more, found a large verdict for the plaintiff. The reader is referred for a full discussion of these cases to Judge Cooley's excellent work on Constitutional Limitations, page *435. See also *Curtis* v. *Mussey*, 6 Gray 261; *Aldrich* v. *Printing Co.*, 9 Minn. 133; *Hunt* v. *Bennett*, 4 E. D. Smith 647; s. c. 19 N. Y. 173. Note to *Munster* v. *Lamb*, 23 Am. L. Reg. (N. S.) 19; *State* v. *Balch*, 31 Kas. 465; *Briggs* v. *Garrett*, 41 Leg. Int. 14.

Without attempting any extended criticism of these cases, it may be remarked that the rule laid down therein affords no privilege whatever to the elector. The sentence first quoted taken alone would seem to concede some privilege to the elector; but taken in connection with what follows, it is deprived of all force. "There is nothing upon the record showing the least foundation or pretence for the charges. The accusation, then, being false, the *prima facie* presumption of law is that the publication was malicious; and the circumstances of the defendant being associated with others does not *per se* rebut this presumption."

It is to be observed that this is precisely the rule laid down by the books in actions for slander and libel, in cases

where there is no question of privilege involved.

The case of *Rearick* v. *Wilcox*, 81 Ill. 77, is similar in principle, in that it substantially negatives the privilege of publication; but it also discusses the measure of damages which was not passed upon in *Lewis* v. *Few*. In *Rearick* v. *Wilcox*, the plaintiff was a candidate for the office of police magistrate in the city of Quincy, and the publication complained of in substance charged dishonesty and corruption, and that, if elected, the candidate would improve "every opportunity for peculation that might by possibility attach to the office." No attempt was made upon the trial to establish the truth of these charges; and it was held proper to prove the facts and circumstances connected with the publication to show absence of malice in fact, and that such evidence was competent upon the question of exemplary damages, but not as affecting compensatory damages; that it was error to instruct the jury that they might in mitigation of damages consider the excitement of the election leading to the publication, or the fact that the article was published for the sole purpose of defeating the plaintiff's election; that the fact that the defendant, as the proprietor of a newspaper, was actuated by what he believed to be for the public good, could not be taken into consideration in mitigation of damages. In delivering the opinion of the court, CRAIG, J., said: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person, who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections."

Both this case and that of *Lewis* v. *Few*, make the gratuitous and unnecessary assumption than any other rule than that prevailing in cases where no privilege is claimed would "give to others a right to accuse him [the candidate] of any imaginable crimes, with impunity;" or that "the private character of a person who is a candidate for office can be destroyed by the publication of a libellous article," &c., which indeed would be "a monstrous doctrine." There would seem to be no great difficulty, however, in formulating a rule that will effectually protect the rights both of the public as represented by the electors, and the candidate, by simply shifting the burden of proof and making the case one of conditional privilege.

Another class of cases makes a distinction between comments on a man's public conduct or qualification for office, and upon his private character, the radical defect of which rule as is well observed by Judge Cooley in his work on Constitutional Limitations (p. *440) consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing his public conduct. See *Gathercole* v. *Miall*, 15 M. & W. 331; *Commonwealth* v. *Morris*, 1 Va. Cas. 176; *Commonwealth* v. *Odell*, 3 Pitts. 449; *Commonwealth* v. *Clap*, 4 Mass. 163: *Sweeney* v. *Baker*, 13 W. Va. 158.

In the case of *Sweeney* v. *Baker*, *supra*, the rule is laid down as follows: "The only limitation to the right of criticism of the *acts* or *conduct* of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right of criticism is confined to the *acts* or *conduct* of such candidate, whenever the *facts* which constitute the act or conduct criticised, are not admitted, they must of course be proven. [It is to be observed that the truth is always a defence in a civil action for libel. Where then is the privilege?] But *as respects his* person there is no such large privilege of criticism though he be a candidate for such office. This large privilege of crit-

icism is confined to his *acts*. The publication of defamatory language affecting his moral character can never be justified on the ground that it was published as a criticism. His talents and qualifications, mentally and physically, for the office he asks at the hands of the people may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate falsely crimes, or publish allegations affecting his character falsely."

It is quite generally held that any false charge affecting the private character of a candidate for, or an incumbent of, an office is actionable. Thus, it has been held actionable falsely to charge an officer with having taken a bribe, or with corruption or want of integrity: *Hamilton* v. *Eno*, 81 N. Y. 116; *Wilson* v. *Noonan*, 35 Wis. 321; *Gove* v. *Blethen*, 21 Minn. 80; *Russell* v. *Anthony*, 21 Kan. 450; *Littlejohn* v. *Greeley*, 13 Abb. Pr. 41; *Dole* v. *Van Rensselaer*, 1 Johns. Cas. 330.

So, falsely to charge an officer with having been intoxicated while in the discharge of his duties: *King* v. *Root*, *supra*; *Gottbehuet* v. *Hubachek*, 36 Wis. 515.

So, falsely to charge a sealer of weights and measures with "tampering with" and "doctoring" such weights and measures, has been held actionable: *Eviston* v. *Cramer*, 47 Wis. 659.

So, falsely to charge a city physician with having caused the death of a patient by reckless treatment: *Foster* v. *Scripps*, 39 Mich. 376.

In *Mayrant* v. *Richardson*, 1 Nott & McC. 348, it was held that to address letters to the electors of a district charging a candidate for the office of member of Congress with having an impaired understanding and a mind weakened by disease was presenting the subject to the proper and legitimate tribunal to try the question, and was not actionable. In the case of *Spiering* v. *Andrae*, 18 Am. L. Reg. (N. S.) 186, however, the Supreme Court of Wisconsin criticise this case, and express the opinion that "the great preponderance of authority is that words charging an officer with gross ignorance and incapacity are actionable *per se*. In this case it was held actionable *per se*, to say of a justice of the peace, that he, the defendant, did not want to sit as a juror before such a d—— d fool of a justice." It is worthy of remark that no attempt was made to prove the truth of the charge. This case as well as some of the preceding ones can be well distinguished from *Mayrant* v. *Richardson*, in that no question of privilege was raised in the case.

The case of *Mott* v. *Dawson*, 46 Ia. 533, seems to lay down a much more rational principle than any of the foregoing cases yet commented upon, excepting the principal case, and perhaps *Mayrant* v. *Richardson*, which latter so far as it goes, seems open to no criticism. In *Mott* v. *Dawson*, the court quote with approval Townshend on Slander and Libel, sect. 241, that "every one who believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such his belief to that other;" and accordingly held that where one in good faith and without malice, makes a charge affecting the character of another, who is a candidate for office, to an elector, shortly before the election, he is not liable to an action therefor, his statement being in the nature of a privileged communication. The charge in this case was of having cheated upon the sale of cattle, and directly affected the moral character of the candidate.

The case of *Briggs* v. *Garrett*, Court of Common Pleas Philadelphia, 41 Leg. Int. 14, though a *nisi prius* case, is one of great interest in this connection, hold-

ing substantially the doctrine laid down in the preceding case of *Mott* v. *Dawson*. See also *State* v. *Balch*, 31 Kans. 465, which, though a criminal prosecution, may be read with profit in this connection.

With reference to the principal case, we are glad to be able to say that it has our unqualified approval. In our opinion in adopting the quotation from page 217 of Cooley on Torts, as the rule of decision, carefully limited as it is in the subsequent portions of the opinion, the learned judge who rendered the judgment of the court has placed his decision upon the solid basis of principle, and has established a precedent that ought to commend itself to every court called to pass upon similar questions in the future.

MARSHALL D. EWELL.

Chicago.

Supreme Court of New York.

FAIRLEE *v.* BLOOMINGDALE ET AL.

Under a statute empowering a married woman to carry on any trade or business on her sole and separate account, she is not authorized to enter into business in partnership with her husband, and the obligations of such a firm cannot be enforced against her.

MOTION for new trial.

Hiller & Krom, for the plaintiff.

Stevens & Mayhew, for defendants.

The opinion of the court was delivered by

WESTBROOK, J.—This cause was tried at the Schoharie Circuit in October 1883. The action was on a promissory note dated April 1st 1876, by which the defendants, who were, at the date of execution of the note, husband and wife, promised to pay "Elizabeth Fairlee (the plaintiff), or bearer, two thousand dollars, with interest, for value received." The note was signed "P. Bloomingdale," "F. M. Bloomingdale," and contained no clause charging the separate estate of the wife, who alone defended.

According to the testimony of the plaintiff, the consideration of this note was an old note, made by the same parties, for $1300, and $700 cash. She further testified that the wife, at the time the money was loaned and the note in suit given, stated they needed the money for goods, that she would see it paid, that she was as much interested in the business as her husband, and that the money was loaned by the plaintiff on the faith of such statement. She further said that the first note was executed by both defendants, that it was also for borrowed money, and that such first loan was upon a statement by the wife to the same effect as to her interest in the business with the one made by her when the note in suit was given.

The defendants, on the other hand, testified that they had never been partners, that the first note was signed by the husband alone, and that neither at the giving of the first or the second note was there any statement by the wife that she was interested in business with the husband.

The jury was charged that if the plaintiff loaned the $700 on the representation of the wife, that she was interested in the business with the husband, she was entitled to recover the $700, with interest; and if the wife had signed the first note, and the loan which the note evidenced had been made upon the faith of the wife's statement that she was interested in the business with the husband, then the plaintiff was also entitled to recover the amount of the first note included in the second; but that the plaintiff was not entitled to recover the amount of such first note unless it had been executed by the wife, and she had also, at the time of its delivery and execution, made the statement attributed to her.

The jury rendered a verdict in favor of the plaintiff for the whole amount of the note, with interest. The defendant—the wife—having made a motion for a nonsuit, which was refused, moves for a new trial upon the minutes, founded upon exceptions taken to the refusal to grant the nonsuit, and also to the charge as made.

The motion for a new trial presents this one question: Are the contracts of husband and wife, professing to be made by them as partners in business, enforceable against the wife?

The obligation upon which the action was brought, did not by its language expressly charge the separate estate of the wife. It was a joint and several promissory note in the ordinary form, signed by the husband and wife separately, by which they or either of them promised to pay the plaintiff or bearer, "two thousand dollars with interest, for value received." To recover upon such a note, therefore, as it was made long prior to the enactment of ch. 381 of the Laws of 1884, it was incumbent upon the plaintiff to show that it was given in or about a trade or business carried on by the wife, or that it was for the benefit of her separate estate: *Manchester* v. *Sahler*, 47 Barb. 155; *Bogert* v. *Gulick*, 65 Id. 322; *Yale* v. *Dederer*, 22 N. Y. 450; *Second Nt. Bk. of Watkins*, 63 Id. 639; *Nash* v. *Mitchell*, 71 Id. 199. That the note was for the benefit of the wife's business was sought to be established by her declaration made at the time of its execution and delivery, to the effect that she was equally interested with her husband in the business

which they were conducting. It was not pretended or claimed upon the trial that the business was the sole business of the wife, nor that she had any other connection therewith than as the partner of her husband. The case, therefore, presents sharply the question of the legal possibility of the existence of a mercantile partnership between husband and wife.

Such partnership, or any partnership between husband and wife, would certainly have been impossible at common law. The rule then was "the husband and wife are one person in law * * * the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything." 1 Bl. Com. 442. The legal conclusion, which the same author states as flowing from the unity of the persons of husband and wife, that the husband cannot covenant with the wife because it "would be only to covenant with himself," clearly forbade a partnership between them, which could only exist between persons having a separate legal existence and the one capable of contracting with the other. This rule of the common law is not questioned, but it is claimed that it has been abrogated by the statutes of this state, or at least so far abrogated as to permit the formation of a business partnership between them, and consequently the making of all agreements, contracts and covenants with each other upon which the existence of such a relation depends. Is this position sound?

The discussion of this question must begin with a recognition of the fact that our legislation has not entirely destroyed "the common-law unity of husband and wife, and made them substantially separate persons for all purposes." Per EARL, J., in *Bertles* v. *Nunan*, 92 N. Y. 152, see p. 159. The wife can only make such contracts as positive enactments allow. Her ability "to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute," Id. 160. With this recent and deliberate utterance of our court of last resort substantially repeated in a still later case (*Coleman* v. *Burr*, 93 N. Y. 17), before us, we must, to uphold a partnership between husband and wife, find a statute authorizing it.

Section two of chapter ninety of the Laws of 1860 is the provision relied upon to validate such an agreement. The act is enti-

tled "An act concerning the rights and liabilities of husband and wife," and the section referred to reads thus: "A married woman (1) may bargain, sell, assign and transfer her separate personal property, and (2) carry on any trade or business, and (3) perform any labor or services on her sole and separate account, and the *earnings* of any married woman, from her trade, business, labor or services, *shall be her sole and separate property*, and may be used or invested by her in her own name."

In determining the effect of this section a well recognised principle of interpretation must also be observed—that "it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the parliament has had that design, it is naturally said, they would have expressed it," Potter's Dwarris on Statutes 185.

The literal interpretation of the words of the statute is that the wife is thereby authorized to "carry on any trade or business, and perform any labor or services on her sole and separate account," and when the "trade or business" and "labor or services" are carried on or performed on her "sole and separate account," the earnings therefrom then, and only then, become "her sole and separate property."

Precisely this construction was given to the act by the court of appeals of this State in *Coleman* v. *Burr*, 93 N. Y. 17, see pages 24 and 25, that court saying: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each to the other remain as they were at common law."

In a partnership there can be no "separate property and business," and the "labor" performed by one partner in connection therewith cannot possibly be on the "sole and separate account" of the partner performing it. There must in every such case necessarily be a joint, and not a "separate property and business" and services on joint account, and not on the "sole and separate account" of one partner.

As, then, the unity of husband and wife at common law forbade

a business partnership between the two, as the common law has only been abrogated so far as express statutes have been clearly indicated an intent to abrogate, and as all statutes abrogating the common law must be strictly construed, it may well be asked, How can a statute which authorizes a wife to hold "separate" property and conduct a "separate" business, and which only gives to her the earnings for labor performed "on her sole and separate" account, be so construed as to authorize her to hold property jointly with her husband, carry on with him a joint business, and give to her earnings of labor which was performed on the joint account of both? The question carries with it its own answer. Very clearly the legislature of this state has not authorized and does not contemplate a business partnership between the two. To repeat the exact language of Judge EARL, in *Coleman* v. *Burr*, 93 N. Y. 17, 25, before quoted: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each as to the other remain as they were at common law." This explicit utterance answers the question propounded, and is decisive of this case. The claim of the plaintiff is that these statutes go much further; that they cover and include a partnership between husband and wife, and relate to their joint property and business, and to the labor which she may perform on their joint account. The court of appeals, however, explicitly declares that they do not; that they touch a married woman in her relations to her husband only in so far as they relate to her separate property and business and the labor she may perform on her sole and separate account, while in all "other respects, the duties and responsibilities of each to the other remain as they were at common law." It is needless to add that if the relations between husband and wife are only changed so as to allow her to own a "separate" property and conduct a "separate business," and to receive the earnings from such "separate property and business," and from "the labor she may perform on her sole and separate account," then a partnership between the two cannot exist; for in such a case the property, business and labor must always be joint and not separate; and because joint and not separate, and therefore not covered by the statutes, the relations of husband and wife remain in regard

thereto as at common law, which forbade a business partnership between them.

Upon the trial of this cause at the circuit the counsel for the plaintiff relied upon the case of *Zimmerman* v. *Earhard & Dodge*, 58 How. 11, in the New York Common Pleas, which was then followed by the court, not, however, without grave doubts then expressed, as to its soundness, and which doubts have by subsequent examination and reflection been developed into a clear judgment that the opinion of BEACH, J., in that case cannot be sustained and should not be followed. It was an action brought by a husband and wife for goods sold by them as partners to the defendants. The sole defence was that the action could not be maintained by the two, because the relation of partners could not exist between them. The opinion referred to is to the effect that husband and wife may legally form a business partnership; but while the result therefrom (an affirmance of a judgment rendered for the plaintiffs in the court below) was concurred in by the other two judges (VAN BRUNT and LARREMORE), yet they were careful so to state and assign other reasons for such concurrence. The premise upon which Judge BEACH predicates his reasoning and conclusion is erroneous. Referring to *Adams* v. *Curtis*, 4 Lans. 164, he quotes therefrom as follows: "The effect and intent of the act (Laws of 1860, ch. 90) is to remove all the disabilities of coverture, so as to enable her to sue and be sued as to contracts, in all respects as though she was in fact unmarried." This, as a legal proposition, has been overruled by the court of appeals in the cases hereinbefore cited (*Bertles* v. *Nunan*, 92 N. Y. 152; *Coleman* v. *Burr*, 93 Id. 17), and therefore all reasoning based upon it must be equally unsound. "All the disabilities of coverture" have not been removed. The legislation of this state has only authorized her to own "separate" property, conduct a "separate" business, and receive wages for services rendered upon "her own sole and separate account." As to a joint property, joint business and joint labor, her relations to her husband remain as at common law. In this present status of the law is also to be found the answer to a further argument of Judge BEACH, that as the wife can employ the husband as an agent to conduct her separate business, therefore she may join the husband as a partner in business, as a partnership "is founded upon agency." The error in the reasoning consists in not bearing in mind the fact that he was arguing in regard to the ability of a person to contract,

who had no general power in that particular—one who could only make such contracts and agreements as express statute law clearly authorized. That person—a married woman—was authorized to own a "separate" property and to conduct a "separate" business, and was therefore empowered to employ an agent in its management or conduct. The agency maintained and perpetuated the separateness of the property and business, and was therefore not incompatible with the statute. When, however, the question relates to the formation of a partnership, the problem to be solved is not what ought a wife to be authorized to do further than is expressly permitted, because the legislation already had is based upon a certain principle which logically should be carried further; but it is, what does the language of the act expressly permit? Perhaps the law as it is should be carried farther, and allow a partnership between husband and wife. The propriety of such a thing is for the legislature and not for the courts. The former may, perhaps, change the common-law rights of husband and wife, and the latter cannot. They can decide that when the wife is authorized to carry on a "separate" business and own a "separate" property, she may employ an agent for that purpose; but they are as powerless to carry the principle involved in the legislation which conferred upon the wife power to own and conduct a "separate" business and property to the case of a joint business and property as they would have been to alter and change the common law in the particular which forbade that which the statute now permits. Innovations upon the common law are for those in whom the power to legislate is vested. What further should be done because of what has been done is for them. The courts declare what the law is, and whilst upholding and enforcing all legal legislative enactments, they must abide by the common law as it is, and not change its unrepealed forbiddings under the specious plea that they only carry out the spirit of an enactment. It is proper, sometimes, in construing a statute, to look at its spirit, but that principle does not authorize courts, when they can see that a certain reason has led to the enactment of a statute changing in some one particular the common law, still further in other particulars to alter and abrogate it. As the power to change or repeal is with the legislature, the rule of construction is that the statute was designed to go just so far, and no farther than its plain words declare. Least of all can it be assumed that legislation designed to separate the property of the

wife from that of the husband and to use it in a "separate" business, allows her to mingle her property with his, and subject it, through a partnership with him, to his control, his management and his contracts.

The conclusion of Judge BEACH in the case referred to is at variance with that of SEDGWICK, J., in *Chamboret* v. *Cagney*, 35 N. Y. Superior Ct. Rep. 474, 487, 488, and those of the courts in two other states. In Massachusetts, which has a statute containing a provision substantially identical with ours, it has been held in several cases (*Lord* v. *Parker*, 3 Allen 127; *Plummer* v. *Lord*, 5 Id. 460, and 7 Id. 481; *Knowles* v. *Hull*, 99 Mass. 562) that husband and wife cannot become partners in business. The reasoning of the court in these cases, and especially in the one first cited (3 Allen 127—see pages 129, 130) is well worthy of attention. The Massachusetts cases have also been recently followed in Indiana (*Haas* v. *Shaw*, 91 Ind. 384; *Scarlett* v. *Snodgrass*, 92 Id. 262), and in that state also a statute contains a provision very similar to ours. These authorities are of too high a character to be disregarded, and should certainly be followed by a trial judge in this state, when the reasoning by which they are supported commends itself to his judgment, and is in harmony with that of our own court of appeals.

It may, however, be said that the decisions referred to go beyond the present case, and forbid a partnership between a married woman and a person not a husband. This is conceded, and it is yet an unsettled legal problem in this state, whether or not any partnership of a married woman, previous to chapter three hundred and eighty-one of the laws of 1884 becoming a legal enactment, which removes all the disabilities of a married woman to make contracts, but does not "apply to any contract that shall be made between husband and wife," would be valid.

There are cases decided which seem to imply that such a thing is possible in this state, and there are others which imply a contrary doctrine. That question is not now determined. Certain it is that the words "separate" and "sole and separate" used in our statute in connection with the property, business and labor of the wife, must have some meaning. If they do not forbid a partnership in property, business or labor with all persons, because not permitting her to engage in a joint venture with any one, then they must refer to property, business and labor "separate" from the husband, held,

carried on and performed on "her sole and separate account" as distinguished from that in which he is interested. Without this construction, at least, of the words, they are meaningless, and with it the impossibility of the soundness of the position assumed by the plaintiff only becomes more apparent.

This opinion might, perhaps, well stop here, but I cannot forbear to allude to another argument based upon direct adjudications of the court of appeals. A valid agreement of partnership can only be made between individuals who are independent persons, and neither owing any duty to the other in regard to such business which shall make the enforcement of the partnership agreement impossible. Is this theory of mutual independence applicable to a wife who is about to embark in a business venture with her husband? In that business the husband at least is interested, and it is exceedingly difficult to determine what the wife owes to him as a duty in connection therewith, from which duty no agreement can absolve her and no partnership contract change. In *Coleman* v. *Burr*, 93 N. Y. 17, the case before referred to, it was held that the promise of the husband to compensate the wife for services rendered to a member of his family, and which services were confessedly meritorious, could not be enforced, for the reason that the wife, because she was a wife, owed these services to the husband. In *Whittaker* v. *Whittaker*, 52 N. Y. 368, it was decided that a note given by a deceased husband to a wife for services, a part of which was "out of door work on her husband's farm, could not be enforced against his estate." If the husband is unable to make a valid promise to pay the wife for services rendered to him, and which in one case were not household duties, upon what principle can a promise to give her one-half of the profits of his business, as a compensation for her services, be upheld? If the two can become partners, the husband who owns a business and has furnished its capital can, under pretence of compensating the wife for services rendered to him therein, make her his partner and divide with her its profits, though such help may be occasional and exceptional as that of the wife upon the farm in one of the cases above referred to. It is this inability of the wife to contract with the husband in regard to her services, which forms, and ever must form so long as the wife owes duties of service to the husband, a barrier to a business partnership between them. That relation, as has been before stated, can only exist when the parties to it are free to form such agreements as to

its profits as they may elect to make. This is vital to a partnership agreement, and the duty of service to the husband would oftentimes make his agreement with her incapable of enforcement. It is true we can conceive of bald instances of services which the wife would not be bound to render; but it is impossible to mark with accuracy the line where her duties as the husband's helpmate terminate. The pursuits and ventures of life are so numerous and variant, and the circumstances and conditions of married life so different, that it is impossible to lay down a rule which shall define the wife's duty of service with precision; and because it cannot be done, there can be no general power to form partnerships between husband and wife, which must cover every enterprise and venture of life, which are as various as the tastes and inclinations of parties and their situations and conditions in the world. If a partnership can exist between husband and wife in the mercantile business, it can in farming or in any other. It may begin with the marriage relation, follow it in every enterprise, and terminate only with the life of one or both parties. This radical change of the status of married persons, subverting in fact the whole social fabric, cannot be legally effected, for the reason before stated, that as the husband is unable to make a legal contract to compensate the wife for services rendered to him in and about his business, he cannot form a partnership with her, which necessarily must, in very many cases, at least, involve a promise to pay for services to which he is legally entitled as husband.

Perhaps the argument to show that husband and wife cannot become business partners is already complete; but two other points are entitled to some attention. First. By section eight of the act of 1860 (the one which it is claimed gives the power), it is declared: "No bargain or contract entered into by any married woman in or about the carrying on of any trade or business under the statutes of this state, shall be binding upon her husband, or render him or his property in any way liable therefor." It can hardly be supposed, that if the legislature supposed it had under that act, of which the provision just quoted forms a part, allowed a partnership between husband and wife, it would have inserted that clause in its present form, without any exception in favor of contracts made by the wife in regard to a business in which the husband was her partner. Second. While chapter 381 of the Laws of 1884 has removed, in general, all disabilities of a married woman to contract,

in its second section it has been carefully said: "This act shall not affect nor apply to any contract that shall be made between husband and wife." This section is certainly significant of legislative intent. If the aim and effect of past legislation were to remove "all the disabilities of coverture," as Judge BEACH assumed in *Zimmerman* v. *Earhard & Dodge*, why was the act of 1884 passed, and why were contracts between husband and wife exempted from its operation? The passage of that statute is a legislative declaration that the wife did yet labor under some of the disabilities of coverture in the making of contracts; and that as to the husband, these disabilities should still be maintained.

Having reached the conclusion that husband and wife cannot be partners in business, and that no contract made by the latter in regard to such business is enforceable against her, it is scarcely necessary to add that any declaration by the wife to the effect that she sustained that relation to her husband, is not binding upon her. In the making of contracts, all parties thereto are assumed to know the law. If the wife had made the direct statement that she was the partner of her husband, the plaintiff had no right to be deceived by it: *Brewster* v. *Striker*, 2 N. Y. 19. It is somewhat questionable whether or not the evidence of the plaintiff, if found to be true, necessarily justifies the legal inference that the wife thereby intended to assert the existence of a legal business partnership with her husband. Her declaration, if made, to the effect that she was equally interested in the business with her husband, was capable of another explanation, and perhaps it was erroneous to assume, as the court did in its charge, that if the jury found that such statement was made, they should find for the plaintiff. It would, perhaps, have been more accurate if the jury had been directed to find whether or not the defendant had thereby intended to assert that she was a partner in the business for which the money was loaned, and was so understood by the plaintiff to assert. Of that error, however, the plaintiff cannot complain. The case was submitted to the jury in the aspect most favorable to her. If, therefore, that which the plaintiff claimed the language evidenced could not legally exist, the plaintiff was not entitled to a verdict.

It is proper to state, in conclusion, that if any doubt existed in my mind in regard to the question discussed, the motion for a new trial would be denied. Careful study of each question has, however, brought me to the clear conviction that the plaintiff was not

entitled to recover against the wife, and that therefore a new trial should be granted.

Motion sustained.

The question of general interest decided in this case is that husband and wife cannot be partners in trade or business, because the statute means that she can only carry on trade or business when it is conducted on her sole and separate account—partnership not being so conducted, but carried on for the joint account of the copartnership. The other reason, that such partnership cannot be formed because the husband cannot contract to compensate his wife for her services in and about his business, is too remote and unsatisfactory to be considered.

The correctness of this decision depends upon the construction of the followinglaw. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name."

If this law means that a married woman is vested with three distinct and independent powers, viz., (1), to bargain, sell, assign and transfer her separate personal property: (2), to carry on any trade or business: (3), to perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate property, then the decision is not correct, because if a married woman is vested with the general power to carry on any trade or business, she can do it by means of a partnership as well as on her own individual account.

If on the other hand, this law means that a wife is vested with these powers to be exercised only for her sole and separate account, then the decision is correct. In other words, does this statute mean, that for her sole and separate account, and for that only, she can deal with her personal property, carry on business, or perform labor; or do the words "on her sole and separate account" only refer to the words "perform any labor or services"?

An Illinois statute in substantially the same terms was construed to mean that a wife was empowered to enter into a copartnership: *Cookson* v. *Toole*, 59 Ill. 515; *Mitchell* v. *Carpenter*, 50 Id. 470; because if she can engage in business, she can do it by means of a partnership. In following the legitimate conclusions deducible from the decisions, BLODGET, J., in the case of *In re Kinkead*, 3 Biss. C.C. 410, said, that under the Illinois statute a wife can engage in trade, using her own property, and may bind herself by all contracts made in such business. She can own the whole stock, have all the profits and be liable for all the losses. If she can own the whole, she can own the half or any other share. "She can become a partner with another person, and why not with her husband. I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she can be a partner with any other person. The logical effect of the statutes and decisions in Illinois tend inevitably to this conclusion, and I can see no sound reason for stopping short of this point." This ruling was affirmed by DRUMMOND, J.

The Arkansas statute is substantially the same as the law above quoted, providing that any married woman may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate

property, and the decisions hold that this confers the powers of a *feme sole*: *Stillwell et ux.* v. *Adams*, 29 Ark. 350; *Hyner* v. *Dickinson*, 32 Id. 779; *Collins* v. *Wassell*, 34 Id. 30; *Countz* v. *Marklin*, 30 Id. 23; *Trieber* v. *Stover*, Id. 731; *Hershy* v. *Clarksville Inst.*, 15 Id. 128; *Collins* v. *Mack*, 31 Id. 685; on the ground that she has under the statute the absolute *jus disponendi*, and probably because other cases tend in the same direction: *Harding* v. *Cobb*, 47 Miss. 599; *Dibrell* v. *Carlisle*, 48 Id. 691; *King* v. *Mittalberger*, 50 Mo. 182; *Naylor* v. *Field*, 5 Dutcher 287; *Knaggs* v. *Mastin*, 9 Kas. 532; *Bressler* v. *Kent*, 61 Ill. 426; *Cole* v. *Van Riper*, 44 Id. 58; *Vandervoort* v. *Gould*, 36 N. Y. 639; *Brown* v. *Fifield*, 4 Mich. 322; *Williamson* v. *Williamson*, 18 B. Mon. 329; *Tillinghast* v. *Holbrook*, 7 R. I. 230.

The Kansas statute contains substantially the same provision, namely, that a married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate property (Act March 31st 1868, § 4), and the courts held that this law constituted a married woman a *feme sole* with respect to such business: *Larimer* v. *Kelley*, 10 Kas. 298; *Tallman* v. *Jones*, 13 Id. 445; *Goings* v. *Orns*, 8 Id. 87; *Knaggs* v. *Mastin*, 9 Id. 532; *Furrow* v. *Chapin*, 13 Id. 107.

It may be doubted whether the Massachusetts statute is identically or substantially the same, or as broad as the law above quoted, yet the power to engage in partnership with her husband is denied, on the ground that it would destroy the separate characteristic of the wife's property which the statute creates, and subject her sole and separate property to her husband's control, which the statute prohibits: *Edwards* v. *Stevens*, 3 Allen 310; *Plumer* v. *Lord*, 7 Id. 481; although in *Lord* v. *Davison*, 3 Id. 131, she was allowed to recover her assigned partnership interest; and in *Reiman et al.* v. *Hamilton et ux.*, 111 Mass. 245, she was held liable for the contracts of her husband, made as master of a vessel, owned jointly by her and her husband, on the ground that this was not a case of copartnership, but of joint ownership with the management intrusted to one of the owners as general agent. See *Knowles* v. *Hull*, 99 Mass. 562, and *Todd* v. *Clapp*, 118 Id. 495, where it can be inferred that this ruling was made because the statute expressly prohibited copartnership business between husband and wife. This Massachusetts construction was adopted in Maine, because of the same statutory provision: *Smith* v. *Gorman*, 41 Me. 405; *McKeen* v. *Frost*, 46 Id. 239; *Dewelly* v. *Dewelly*, Id. 377.

The construction in Indiana was probably based on the statutory provision that husband and wife cannot contract with each other; *O'Daily* v. *Morris*, 31 Ind. 111; *Montgomery* v. *Sprankle*, Id. 113; *Haas* v. *Shaw*, 91 Id. 384; *Scarlett* v. *Snodgrass*, 92 Id. 262. The question was not considered in Alabama, probably because the statute prohibits such contracts: *Reel* v. *Overall*, 39 Ala. 138; nor could it arise in California, Colorado, Connecticut or Georgia, because the statute expressly empowers such business: Kelly Cont. M. W. 332–342; nor in Maryland, because the statute prohibits it: *Bradstreet* v. *Baer & Co.*, 41 Md. 19; Gen. Stat., art. 45, § 7.

The statute in Iowa is not, we think, any broader than the one above quoted, and yet the courts held that a married woman is a *feme sole*, with respect to this business: *Jones* v. *Glass*, 48 Iowa 345; *Smedley* v. *Felt*, 41 Id. 588; *Hamilton* v. *Lightner*, 53 Id. 470; *Laing* v. *Cunningham*, 17 Id. 510; *Russell* v. *Long*, 52 Id. 250; but see *Grant* v. *Green*, 41 Id. 88. The legal proposition advanced is, that a statute empowering a married woman to enter into, and carry on business on her sole and separate account, or to carry on business as a *feme sole*, does not authorize her to enter into a copart-

nership with her husband, nor to join her labor and capital to his in one and the same business enterprise, although she may do it with others. Partnership is one of the common methods of carrying on business, and in many enterprises the only method. If a married woman is empowered to engage in business, she is also empowered to enter into copartnership, because the former includes the latter. If this is true it should also follow that in the absence of fraud or a statutory inhibition, a wife can enter into copartnership in business with her husband.

A married woman's capacity to enter into, conduct and contract concerning, her separate trade or business, comes from three sources; first, her capacity as a *feme sole* trader; second, to conduct a separate business by agreement with her husband; and third, her power to carry on business under a statute expressly conferring that power. The first originated in the custom of London, and under it she was *sui juris* in every particular; she could sue and be sued, arrested and imprisoned for debt, and be declared a bankrupt: Chit. Cont. 178; 2 Bright H. & W. 77; 2 Rop. H. & W. 124; Macq. H. & W. 323. This custom was recognised in South Carolina, but restricted to certain limits; *McDaniel* v. *Cornwell*, 1 Hill 428; *Robards* v. *Hutson*, 3 McCord 475; *Newhiggin* v. *Pillans*, 2 Bay 162; *Hobart* v. *Lemon*, 3 Rich. 131; *Brown* v. *Killingsworth*, 4 McCord 429; *Wilthaus* v. *Ludecas*, 5 Rich. 326. It was looked to as something of a precedent, in the Pennsylvania adjudications in construing the statute: *Burke* v. *Winkle*, 2 S. & R. 189; *Jacobs* v. *Featherstone*, 6 W. & S. 346; *Black* v. *Tricker*, 9 Smith 13; *Wilson* v. *Coursin*, 22 Id. 306, and see *Rhea* v. *Rhenner*, 1 Pet. 105. From the civil law is derived the capacity to become a sole trader having *sui juris*, powers, in Louisiana, California and the South Western Territory, originally colonized by the French or Spanish: *Christensen* v. *Stumpf*, 16 La. Ann. 50; *Guttman* v. *Scannell*, 7 Cal. 455: *Reading* v. *Mullen*, 31 Id. 104; *Atwood* v. *Meredith*, 37 Miss. 635; *Oglesby* v. *Hall*, 30 Ga. 386.

The second method has always been upheld in equity, 2 Story Eq. Jur. § 1385 and cases cited in Kelly Cont. M. W. 155. The statutory method covers these methods which existed at the time of the enactment of the statute, but such statutes differ in most all the states, and the powers and obligations are correspondingly different. In some states these are prescribed by a court: *Moran* v. *Moran*, 12 Bush 303; *Wilkinson* v. *Cheatham*, 45 Ala. 341; and in others by a certificate of record: *Adams* v. *Knowlton*, 22 Cal. 289.

The power must be conferred, it is not inherent under the common law; *Woodcock* v. *Reed*, 5 Allen 207; and the extent of the power depends upon the grant: *Sammis* v. *McLaughlin*, 35 N. Y. 647; hence if the grant does not so prohibit, the husband can set his wife up in business, if he has no creditors at the time: *Mitchell* v. *Sawyer*, 21 Ia. 583; but the business must be a regular and continuous course of trading, and not an occasional act or fitful off and on, now and then transaction: *Holmes* v. *Holmes*, 40 Conn. 120; *Proper* v. *Cobb*, 104 Mass. 589; *Feran* v. *Rudolphsen*, 106 Id. 471.

Interpreting the statute by the equity doctrine and the custom of London, the rule is believed to be, that when a married woman is granted the power to carry on business, she has the power to make every contract and perform every act necessary or incident to that business, unless restricted unequivocally and expressly by such staunte: *Adams* v. *Honness*, 62 Barb. 336; *Todd* v. *Lee*, 16 Wis. 482; *Petty* v. *Anderson*, 3 Bing. 170; *Foster* v. *Conger*, 61 Barb. 145; *James* v. *Taylor*, 43 Id. 530; *Abbey* v. *Deyo*, 44 N. Y. 343; *Draper* v. *Stouvenel*, 35 Id. 507; *Barton* v. *Beer*, 35 Barb. 81; *Klen* v. *Gibney*, 24 How. Pr.

31; *Young* v. *Gori*, 13 Abb. Pr. 14, note; *Chapman* v. *Briggs*, 11 Allen 547. But it seems this is not the construction in Pennsylvania: *Robinson* v. *Wallace*, 39 Penn. St. 133; *Wieman* v. *Anderson*, 42 Id. 311; *Manderback* v. *Mock*, 29 Id. 43; *Hoffman* v. *Toner*, 49 Id. 231; *McGregor* v. *Sibley*, 69 Id. 388.

JOHN F. KELLY.

Bellaire, O.

Supreme Court of Missouri.

DESKINS *v.* GOSS.

A teacher in the public schools, in the absence of the establishment of any rule by the school board, has the right to adopt a rule to prevent his pupils using profane language, fighting or quarreling on their way to and from school, and may punish those infringing the rule by the use of the rod.

The opinion of the court was delivered by

NORTON, J.—This suit was brought to recover damages for alleged injuries inflicted by defendant on plaintiff in whipping him with a switch. The answer of defendant sets up that he was a teacher of the public school; that plaintiff was one of the pupils of said school, and that for a violation by plaintiff of a rule of the school, in using profane language, quarreling and fighting with the other scholars of the school, he did, in order to preserve good order and discipline in the school and to promote its usefulness, chastise plaintiff with a switch, inflicting upon him reasonable and moderate punishment.

Plaintiff obtained judgment for $9, from which the defendant has appealed. On the trial plaintiff offered evidence tending to show that the punishment inflicted was excessive; that plaintiff did not use profane language to, or quarrel or fight with the other scholars. The defendant offered evidence tending to prove the facts set up in his answer, and the following agreed statement of facts was then read to the jury, viz: "That the defendant was at the time the employed teacher of the public school at which the plaintiff was a regular daily attendant on and during the day that the acts and conduct complained of occurred, and for which the defendant chastised him; that the profane language used, the quarreling and fighting was done, if at all, one-half or three-fourths of one mile from the schoolhouse, after the school had been adjourned for the day and the scholars were on their way to their respective homes, and before they had reached them, and the punishment was inflicted the next day thereafter, when the plaintiff returned to the

school; that the defendant, as teacher, had a standing rule against the use of profane language, quarreling or fighting among the scholars, either at the school house or on their way home, and often spoke of the rule in the presence of the school and the plaintiff; that plaintiff was, at the time of the chastisement, 13 years of age, and that all this occurred in the county of Grundy, Mo."

The court then instructed the jury that under the evidence and pleadings the jury must find for the plaintiff, and refused to give several instructions asked by the defendant, to the effect that plaintiff while in attendance as a scholar was under the control of defendant as teacher, and that defendant had a right to punish him for an infraction of the rule put in evidence in the agreed statement of facts, and that the verdict of the jury should be for defendant unless they believed that the punishment inflicted was unreasonable or excessive.

It is this action of the court which is complained of as error, and we are of the opinion that the complaint is well founded. While it is provided in section 7045, Revised Statutes, that "the school board shall have power to make all needful rules and regulations for the government of the school in their district," if they failed to do so, the right of the teacher employed to conduct the school to adopt reasonable rules to promote good order and discipline arises out of the very nature of his employment, and the only question worthy of consideration which this record presents is, was the rule which forbade the use of profane language, quarreling or fighting among the scholars, either at school or on their way home, reasonable and promotive of good order and proper discipline of the school. It must be conceded without question that the rule, in so far as it forbade such acts on the part of the scholars while at school, was not only reasonable but necessary to the orderly conduct of the school.

But it may be insisted and doubtless was urged before the trial court, that so soon as the scholars were dismissed from school by the teacher his authority over them ceases, and that of the parent is resumed, and that therefore that portion of the rule which forbids such acts as are therein mentioned, while the scholars are on their way to their homes, is without sanction or authority. We are unwilling to go to this extent, believing it to be unsupported either by reason or weight of authority.

In the case of *Dritt* v. *Snodgrass*, 66 Mo. 286, this court went

to the extent of saying that when the pupil of a public school is released and sent back to his home, neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye. This court also, in the case of *King* v. *Jefferson City School District*, 71 Mo. 628, sustained the validity of a rule which provides that "any pupil absent six half days in four consecutive weeks, without satisfactory excuse, shall be suspended from school." In that case a pupil had played the truant and thereby become amenable to the operation of the rule and was expelled, and this court refused to interfere on the ground that the rule was a reasonable one. Truancy is an act committed out of the school-room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion.

If the effects of acts done out of the school-room while the pupils are returning to their homes, and before parental control is resumed, reach within the school-room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden and punishment inflicted on those who commit them: *Burdick* v. *Babcock et al.*, 31 Ia. 562–7; *Lander* v. *Seaver*, 32 Vt. 114; *Sherman* v. *Inhabitants of Charleston*, 8 Cush. 160.

The effects of the scholars using to and with each other obscene and profane language, quarreling and fighting among themselves on the way to their homes, would necessarily be felt in the school-room, engender hostile feelings between scholars, arraying one against the other as well as the partisans of each, and destroying that harmony and good-will which should always exist among the scholars who are daily brought in contact with each other in the school-room.

For the error committed in giving the plaintiff the first and second instructions and refusing those asked by the defendant, numbered two, three, four, five and seven, the judgment will be reversed and cause remanded. All concur.

By the old authorities it is said that the authority as to punishment of a teacher over a pupil is the same as that of the parent over the child: 1 Hawk P. C. (6th ed.) sect. 23; Bac. Abr. tit. *Assault and Battery*, C.; Pulton de Pace, 6 *b*. And some of the modern authorities adopt this view: 1 Bish. Crim. L. (4th ed.) sect. 771; see *Fitzgerald* v. *Northcote*, 4 F. & F. 656; *Starr* v. *Liftchild*, 40 Barb. 541; *Commonwealth* v. *Seed*, 5 Clark P. L. J. 78. But such a broad rule has not gone unquestioned, even by the eminent commentators on the

laws of England: 1 Black. Com. 453; see Chitty's note; *State* v. *Burton*, 45 Wis. 150; s. c. 30 Am. Rep. 706; 18 Am. L. Reg. 233; *Lander* v. *Seaver*, 32 Vt. 114. In this latter case it was said: "The parent, unquestionably, is answerable only for malice or wicked motive, or an evil heart in punishing his child. This great, and to some extent, irresponsible power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. * * * This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning. The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise."

In another case it was said: "The law having elevated the teacher to the place of the parent, if he is still to sustain that sacred relation, it becomes him to be careful in the exercise of his authority, and not make his power a pretext for cruelty and oppression. Whenever he undertakes to exercise it, the cause must be sufficient, the instrument suitable for the purpose; the manner and extent of the correction, the part of the person to which it is applied, the temper in which it is inflicted, all should be distinguished with the kindness, prudence and propriety which becomes the station:' *Cooper* v. *McJunkin*, 4 Ind. 290.

In Massachusetts, the court refused to instruct the jury "that a school teacher is amenable to the law in a criminal prosecution, for punishing a scholar, only when he acts *malo animo*, from vindictive feelings, or under the violent impulses of passion or malevolence; that he is not liable for errors of opinion or mistakes of judgment merely, provided he is governed by an honest purpose of heart to promote, by the discipline employed, the highest welfare of the school and the best interest of the scholar; that he is liable in a criminal prosecution for punishing a scholar only when the amount of punishment inflicted is more than adequate to subdue the scholar and secure obedience to the rules of the school." This action of the court was held to be unobjectionable; and the following in substance was held to state the law correctly: "That a teacher had a right to inflict punishment upon a scholar; that the case proved was one in which such punishment might properly be inflicted; that the instrument used (a ferrule) was a proper one; that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and must be governed, as to the mode and severity of the punishment, by the nature of the offence, by the age, size and apparent power of endurance of the pupil; that the only question in this case was whether the punishment was excessive and improper; that if they should find the punishment to have been reasonable and proper, the defendant could not be deemed guilty of an assault and battery; but if upon all the evidence in the case they should find the punishment to have been improper or excessive, the defendant might properly be found guilty upon this complaint:" *Commonwealth* v. *Randall*, 4 Gray 36. A like conclusion was reached in Vermont, except that if there was any reasonable doubt whether the punishment was excessive, the teacher should have the benefit of the doubt: *Lander* v. *Seaver*, 32 Vt. 114.

The rule, however, is well established that the teacher has the right to chastise his pupil moderately; and whenever the correction as confessed by the pleadings, or as proven at the trial, appears clearly to have been excessive or cruel, it must be adjudged illegal: *Anderson* v. *State*, 3

Head. (Tenn.) 455; *Burlington* v. *Essex*, 19 Vt. 91; *Commonwealth* v. *Seed*, 5 Clark P. L. J. 78; *Morris's Case*, 1 City Hall Rec. 52; *Starr* v. *Liftchild*, 40 Barb. 541; *Link* v. *Bell*, 3 Quarterly L. Jr. 92; *State* v. *Mizner*, 45 Iowa 248; s. c. 50 Id. 145; s. c. 43 Am. Rep. 128.

If no rule of the school board prevents it, the teacher may punish the pupil within the bounds prescribed by law, even though he has an instruction from the father that the child must not be punished: *State* v. *Van Strang*, 3 Tenn. L. Rep. 19.

In case the punishment is proper the father is not excusable if he assault the teacher because of it: *Morris's Case*, 1 City Hall Rec. 52.

A pupil beyond the school-age is subject to punishment as any other pupil: *State* v. *Mizner*, 45 Ia. 248; s. c. 24 Am. Rep. 769; *Stevens* v. *Fassett*, 27 Me. 266.

The teacher is not confined to mere whipping; he may impose a reasonable restraint upon the person of the pupil, either by way of prevention or punishment of disorderly conduct: *Fitzgerald* v. *Northcote*, 4 F. & F. 656; Cooley on Torts 171.

The teacher is the absolute judge of the kind of punishment, with the limitation that it must be reasonable and usual, and not destructive of the object of the relation, or subversive, of the contract under which the relation exists: *Starr* v. *Liftchild*, 40 Barb. 541; see *Butler* v. *McLellan*, Ware 219, 230.

The object and design of punishment must always be kept in view. These have been stated as follows: "The legal objects and purposes of punishment in school are like the objects and purposes of the state in punishing a citizen. They are threefold: first, the reformation and the highest good of the pupil; second, the enforcement and maintenance of correct discipline in schools; and third, as an example to like evildoers: *State* v. *Mizner*, 50 Ia. 145; s. c 32 Am. Rep. 128.

No punishment is justifiable unless it is inflicted for some definite offence which the pupil has committed; and the pupil must understand what he is being punished for. If he does not know why the punishment is inflicted, the act is unlawful; it is subversive and not promotive of the true object of punishment, "and cannot be justified:" *State* v. *Mizner*, *supra*.

In the absence of proof the law presumes that a teacher punished his pupil for a reasonable cause and in a moderate and reasonable manner. This presumption, like all other legal presumptions, may be rebutted by proof: *State* v. *Mizner*, 50 Ia. 145; s. c. 32 Am. Rep. 128; *Hathaway* v. *Rice*, 19 Vt. 102.

The teacher has the right to show that the chastisement was reasonable, and for misconduct in school: *State* v. *Mizner*, 45 Ia. 248; s. c. 24 Am. Rep. 769.

In one case, in speaking of the extent of the punishment, it was said: "The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. * * * When the correction administered is not in itself immoderate, and not, therefore, beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of this authority the master is the judge when correction is required, and of the degree of correction necessary;

and like all others intrusted with a discretion he cannot be made penally responsible for error of judgment, but only for wickedness of purpose:" *State* v. *Pendergrass*, 2 Dev. & Bat. 365. In another case it was held in order to hold a teacher liable for chastising a pupil, the circumstances must show a strong reason to believe that he was actuated by bad and malevolent motives, using his legal authority for the gratification of a mind bent on mischief: *Commonwealth* v. *Seed*, 5 Clark P. L. J. 78.

Where a person took a child into his house to instruct, agreeing to instruct and protect him, and provide for his physical wants, he was, it was held, not entitled to turn him out into the street, withdraw his care and protection, and deny him the shelter and comfort of his home under the name or form of punishment. Such a mode of punishment was deemed neither reasonable nor usual: *Starr* v. *Liftchild*, 40 Barb. 541.

Two boys, attending a Catholic school, were absent one day, without leave, to attend the funeral of a Protestant child. The fathers of the boys ascertained that the superintendent of the school intended to whip the boys for attending the funeral, and they requested him not to punish them for that reason. On the boys returning to school, the teacher having them in immediate charge, required them to give an excuse for their absence from school without permission, on the day of the funeral, and on their refusal to give excuses, she gave them a note and directed them to take it to the superintendent's house, about fifty steps from the schoolhouse. As soon as they were outside of the schoolhouse they ran home and never delivered the note. The next day the superintendent entered the schoolroom and whipped the two boys, declaring at the time that the whipping was not for going to the funeral, but for their disobedience of the order of the teacher in charge requiring them to take and deliver her note to him. It was held he, as defendant in an action for assault and battery, was not liable to a fine for such action on his part: *Danenhoffer* v. *State*, 69 Ind. 295, 418; s. c. 35 Am. Rep. 216. On the second trial of the case it was held that he had a right to show that the administering of the punishment had nothing to do with the going to the funeral: *Danenhoffer* v. *State*, 79 Ind. 75.

In a Vermont case it was held that excessive punishment could not be justified from the fact that the teacher acted in good faith and without malice, honestly believing the punishment was necessary for the discipline of the school and the welfare of the pupils: *Lander* v. *Seaver*, 32 Vt. 114.

Where the teacher beat the pupil, with the consent of the father, so severely that the latter died it was held that he was guilty of manslaughter: *R.* v. *Hopley*, 2 F. & F. 202.

If compulsory education has not been adopted by the legislature, the board of education, in the absence of an express statute, has no power to require a pupil to pursue a particular study in opposition to the father's desire; and a teacher is not justified in punishing the pupil for refusing to pursue the particular study: *Rulison* v. *Post*, 79 Ill. 567; *Morrow* v. *Wood*, 35 Wis. 59; s. c. 13 Am. L. Reg. 692; *State* v. *Migner*, 50 Ia. 145; s. c. 32 Am. Rep. 128. But a requirement by the teacher that a pupil in a grammar school must write English compositions was held reasonable; and on a refusal by a pupil, in the absence of any direction by the parent, to comply with the requirement it was also held he could be expelled by the teacher on that account: *Guernsey* v. *Pitkin*, 32 Vt. 224. The board of directors may adopt such a rule: *Sewell* v. *Board of Education*, 29 Ohio St. 89.

In the absence of any rule of the school board, or of a statute, a teacher has the power to suspend a pupil for good cause from the privilege of the school. It is

essential that the teacher should have such power, in the absence of the action of the board, to maintain order and discipline. He is responsible for the discipline of the school, and for the progress conduct and deportment of his pupils. "It is his imperative duty to maintain good order and require of his pupils a faithful performance of their duties. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils:" *State* v. *Burton*, 45 Wis. 150; s. c. 30 Am. Rep. 706; 18 Am. L. Reg. 233. For this reason he has the power, under the limitations named, to suspend a refractory pupil. "The conduct of a recusant pupil may be such that his presence in the school for a day or an hour may be disastrous to the discipline of the school, and even to the morals of the other pupils. In such a case it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privilege of the school; and he must necessarily decide for himself whether the case requires that remedy. If he suspends the pupil, he should promptly report his action and his reason therefor, to the proper board:" *State* v. *Burton*, *supra*. Yet a pupil cannot be suspended or expelled unless authorized by statute, either by the teacher or board of directors, except "for disobedient, refractory, or incorrigibly bad conduct:" *Rulison* v. *Post*, *supra*; *State* v. *Burton*, *supra*; and perhaps a teacher has no power to *expel* him. Upon suspension the teacher may at once remove him from the school room, using such force as is necessary; and he may call others to his aid, who may use a like force: *Stevens* v. *Fassett*, 27 Me. 266.

A recent ruling of the Supreme Court of Wisconsin will illustrate many of the above statements. The board of education of a city established a rule requiring each pupil, when returning to school after recess, to bring into the school room a stick of wood for the fire. This rule was held void, because not "needful for government of the schools" within the meaning of the statute clothing the board with its powers: *State* v. *Board of Education*, ante, page 601.

It is often a question with teachers, pupils and parents how far the authority of the teacher extends when not at, or in the immediate vicinity of, the school-room or house. In practice and in principle he has the same control during school hours over the pupils while in the school house or in the school yard, or in the immediate vicinity, so long as he is not on the parent's own immediate place of residence, that he has in the school-room. In Vermont, it was decided that the teacher has supervision and control over the pupil from the time he leaves home to go to school until he returns home from school. This is a reasonable rule. It designates the point of time where the parent delivers the charge of the pupil over to the teacher, and where the latter yields it back to the parent. It is often necessary to the discipline of the school that the teacher should have such a control. Yet in this case it was also held, although the teacher had no general right to punish a pupil for misconduct committed after the dismissal of school for the day and the return of the pupil to his home, yet he might, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which had a direct and immediate tendency to injure the school and subvert the master's authority: *Lander* v. *Seaver*, 32 Vt. 114. See *Murphy* v. *Board of Directors*, 30 Ia. 429, a case based on a statute.

In the Missouri decision, *Dritt* v. *Snodgrass*, 66 Mo. 286; s. c. 27 Am. Rep. 343, cited in the principal case, the statute gave the board of directors "power to make and enforce all needful

rules and regulations for the government, management and control of such schools and property as they think proper, * * * not inconsistent with the law of the land." A board had adopted a rule that no pupil should, during a school term, attend a social party. A pupil of the school, with the permission of his parents, violated this rule, and was expelled by the board for so doing. It was said that the directors had no power to follow the pupil home and govern his conduct while under the eye of his parent, and that the rule invaded the power and right of the parent. This point, however, was not directly decided; but it was held that as no malice, oppression, or wilfulness was shown on the part of the directors, they were not liable in damages.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Minnesota.

TIERNEY v. MINNEAPOLIS & ST. LOUIS RAILWAY CO. ET AL.

It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence.

By a regulation governing the employees in the transfer-yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and if out of repair to mark them "in bad order," indicating that they were to be sent to the "repair track:" *Held*, that negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company.

It will not be presumed under such circumstances that the plaintiff assumed the risk of such negligent inspection, unless it appear that he undertook to handle cars in the course of his employment without reference to inspection.

MITCHELL, J., dissents, on the ground that the car inspector was a fellow servant with the employees engaged in making up the train.

A witness who is not an expert may testify to facts within his knowledge and observation in reference to the health and physical condition of an injured person.

APPEAL from an order of the District Court, Freeborn county, denying motion for new trial.

Lovely & Morgan, for respondent.

J. D. Springer and *Whytock & Todd*, for appellants.

The opinion of the court was delivered by

VANDERBURGH, J.—It is admitted that the defendants jointly owned, maintained and occupied a yard in common at Albert Lea, where trains were made up to be sent over their respective lines. The respondent had charge of the making up of night trains in the yard, and was injured in the course of his employment, while

coupling cars, at about 3 o'clock in the morning of November 24th 1882. A freight train had previously arrived from Minneapolis over the Minneapolis & St. Louis road, including, with others, a box car loaded with flour at that place and bound east. On its arrival, it became plaintiff's duty, according to the usual course of business, to obtain a list of the cars and their destination, so that he might proceed to make the necessary transfers in making up the outgoing trains. It was the duty of the car inspectors, two of whom were employed for night service, to inspect all cars in trains on their arrival. The plaintiff had been in the employ of defendants a little more than two weeks, and must have been familiar with the manner in which the business was carried on in the yard. On the night in question, about half an hour after the arrival of the train mentioned, the plaintiff, who had been switching and distributing cars, brought an unloaded flat car from the wood track to the main track, upon which the box car we have referred to still stood, and undertook to couple them. His evidence tends to show that as he went to make the coupling, and while the cars were coming together in the usual way, the draw-bar of the flat car struck and overrode the draw-bar of the box car, which appeared to be loose and insecurely supported, and dropped down when struck by the approaching car, thus permitting the two cars to come together and intercept the plaintiff, and resulting in his being run over upon the track, and in causing the loss of a leg, which was necessarily amputated above the knee.

While it may be conceded, for the purposes of this case, that from the circumstances and nature of plaintiff's employment, in which cars from many roads were brought together with coupling attachments of different heights and patterns, he would assume the ordinary risks of the service from such causes, we think, upon the evidence, the question was fairly for the jury whether the accident occurred from such causes, or from the fact that the draw-bar of the box car was insecurely supported and in an unsafe condition, from neglect to repair the same. Upon this issue the evidence in plaintiff's behalf, among other things, tended to show that the strap or carrying-iron which supported the draw-bar was worn, weak, and loose, and that some of the bolts which were intended to keep this iron strap in place were loose or broken, that it had been out of repair for a considerable time, and the defects were such as could readily be discovered by proper inspection.

The evidence of the defective condition of the car, which appears to have been previously in the possession of one of the defendants, the Minneapolis & St. Louis Company at Minneapolis, and during its transit to Albert Lea, a distance of 108 miles, was received and submitted to the jury without any objection or suggestion that the liability did not attach equally to both defendants for any negligence in respect to this car prior to its arrival at Albert Lea. This point is now suggested for the first time; but we think, under the circumstances, the attention of the court should have been called to this matter when the evidence was received, or when the jury were instructed. As the case stands, since we think there was evidence for the jury tending to show a joint liability for negligence in the yard at Albert Lea, it is too late to raise the question in this court as to the competency or sufficiency of the evidence of previous negligence to charge the defendants.

Evidence was received, under the defendant's exception, showing a regulation of defendants in relation to the inspection of cars, under which it became the duty of the car inspectors, if any were found defective or in need of repairs, to mark them so as to indicate that they were in bad order, and hence not to be sent out, but to be sent to the repair track. We think this evidence was properly received upon the question of defendants' liability; for if the car in question was defective and unsafe, which, as we have seen, was for the jury, then such regulation was binding upon the inspectors as representing the defendants for the protection of employees in the yard, unless it should appear that it was one of the risks of the service assumed by them to handle cars there without regard to inspection, or their condition, or any notice thereof. It may have been a question for the jury, under proper instructions, to determine whether or not, from the nature of the service in which the plaintiff was employed, he was required to proceed to switch cars and make up trains without regard to inspection, and without waiting for it; but instructions of this character were not asked or given, and the evidence does not show that such risk necessarily attached to plaintiff's business, and was hence assumed by him.

The position taken by defendants' counsel at the trial appears to have been that the plaintiff did not give the inspectors the necessary time to complete their work; and the case was submitted to the jury under instructions given, at defendants' request, that "if

he did not do so," or "if he did not know or have reason to believe that all the cars in said train were inspected before he caused them to be moved, he cannot recover." This question was determined by the jury in plaintiff's favor upon the evidence.

As before remarked, it was the duty of the inspectors to examine cars immediately upon their arrival, and the evidence tends to prove that it was their practice to so inspect them upon the track before their removal. The inspection of the train was, in fact, so made on the night in question. There is some conflict in the testimony as to the length of time it would take to properly inspect such a train of cars, and it does not clearly appear how much time had elapsed before the injury; the plaintiff's recollection being that it was from twenty-five to forty minutes. But it appears that the inspectors had, in fact, completed their work before the accident. The negligence of the inspectors was therefore proper to be considered upon the question of the defendants' liability. If it is the duty of the corporation to exercise reasonable diligence to supply suitable and safe instrumentalities for the use of its servants to work with, it is also its duty to use like diligence to keep the same in proper repair. This necessarily involves inspection and examination as incident to the obligation to repair, and, as a corporation must necessarily act through agents, the negligence of its employees in the discharge of such duty is attributable to the corporation: *Solomon Rd. Co.* v. *Jones*, 30 Kans. 601; *Railroad Co.* v. *Holt*, 29 Id. 149; *Brann* v. *Rd. Co.*, 53 Iowa 595; *Porter* v. *Rd. Co.*, 71 Mo. 77, 78; *Railroad Co.* v. *Jackson*, 55 Ill. 492; *Condon* v. *Missouri Pacific Rd. Co.*, 78 Mo. 567; *Crispin* v. *Babbitt*, 81 N. Y. 521; *Fuller* v. *Jewett*, 80 Id. 52, 53; *Kirkpatrick* v. *Rd. Co.*, 79 Id. 240; *Slater* v. *Jewett*, 85 Id. 70, 71; *Durkin* v. *Sharp*, 88 Id. 227; *Murphy* v. *Rd. Co.*, Id. 152; *Dana* v. *Rd. Co.*, 92 Id. 642; *Vosburgh* v. *Rd. Co.*, 94 Id. 380; *Kain* v. *Smith*, 25 Hun 149; *Wedgwood* v. *Rd. Co.*, 41 Wis. 483; s. c. 44 Id. 48, 49; *Smith* v. *Rd. Co.*, 42 Id. 526; *Richardson* v. *Great Eastern Rd. Co.*, L. R., 1 C. P. Div. 342.

In *Fuller* v. *Jewett*, *supra*, it is said by the court: "The duty of maintaining machinery in repair for the safety of employees is the same in kind as the duty of furnishing a safe and proper machine in the first instance;" and "in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who

sustains the injury." This corresponds to the language of the same court (CHURCH, C. J.) in *Flike* v. *Rd. Co.*, 53 N. Y. 553, and (FOLGER, C. J.) in *Slater* v. *Jewett*, 85 Id. 70, 71. Substantially the same doctrine is adopted by this court in *Drymala* v. *Thompson*, 26 Minn. 41; and we think that case must control the disposition of the question under consideration. In some states the courts hold that this rule is not applicable to subordinate employees, as in the case of ordinary car inspectors at the transfer yards, but that the latter are to be deemed fellow-servants of other employees injured through their negligence: *Railroad Cos.* v. *Webb*, 12 Ohio St. 494; *Little Miami Rd. Co.* v. *Fitzpatrick*, 41 Id.; *Smoot* v. *Rd. Co.*, 67 Ala. 13. The rule adopted in these and other cases is followed in *Smith* v. *Rd. Co.*, 46 Mich. 258; *Mackin* v. *Rd. Co.*, 135 Mass. 206, as applied to foreign cars in transit, which a railway company is obliged by law to draw over its line. In the case last cited the court say by way of explanation: "However it may be as to other cars, the inspectors must be regarded as engaged in a common employment as to such cars while in transit, and until ready to be inspected for a new service." One reason given is that the company was not obliged to repair such cars. That question we need not consider in this case. This car was loaded at the terminus of the line, and by defendants' own regulations was required to be inspected, and, if damaged, to be properly marked to indicate that fact, at its general yard at Albert Lea, by the agents of the defendants appointed for such purpose.

It is difficult to lay down a general rule which will be applicable in practice, and define accurately the limits of the master's liability in this class of cases. But if the special duty and responsibility belong to the car inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair shops. But the general examinations which experience has shown practicable and necessary to

be made of cars at the yards designated for such purpose, without causing undue delay, while in the course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care: *Richardson* v. *Great Eastern Rd. Co., supra.*

In respect to patent defects in the coupling apparatus, brakes, wheels, &c., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of a switchman, brakeman or other operative: *Wedgwood* v. *Railroad Co.*, 44 Wis. 48; *Schultz* v. *Railroad Co.*, 48 Id. 381. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees, unless maintained in a safe condition; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities. Placing and keeping such machinery upon the road in actual use, would be an assurance to ordinary servants that the same is fit and safe, in so far as the exercise of reasonable diligence could make it: *Murphy* v. *Railroad Co.*, 88 N. Y. 152. So, in the matter of separating damaged cars from those remaining in use with a view to repairs, the cases proceed upon the principle that enough must have been done by the master to indicate, in conformity with some proper regulations or usage of the company, the condition or character of such cars for the protection of employees who are to handle them: *Flannagan* v. *Railroad Co.*, 50 Wis. 471; *Watson* v. *Railroad Co.*, 58 Tex. 439; *Fraker* v. *Railroad Co.*, 19 N. W. Rep. 351. And the rule that the corporation is bound to know the defective condition of its cars within a reasonable time, is in harmony with the doctrine that the agents charged with a special duty of looking after and repairing its cars and machinery, *pro hac vice* represent the master.

As before stated, this case does not, we think, differ in principle from *Drymala* v. *Thompson, supra.* There the negligence of the section foreman engaged in repairing the track, who would have otherwise been deemed a fellow-servant with the injured party, was held to be that of the defendants, and it would have constituted no defence that the company had employed competent men, adopted

proper regulations, or provided suitable materials, and an adequate system for supervising and repairing its track. On the other hand in *Brown* v. *Railroad Co.*, 27 Minn. 162, a road-master engaged with the injured party in operating machinery was held not to represent the company. It is the kind of service, not the grade, which distinguishes these two cases. The one related to maintaining safe instrumentalities; the other, to the use of them.

The application of the rule, as well as the question of the degree of risk assumed by employees, will, of course, be largely influenced by the special circumstances of any particular case. And so, as to different kinds of business, the amount of care required, and the system to be adopted and carried out, are to be determined by the circumstances of each case, depending upon the nature of employment, the extent, hazard and usages of the business, the kind of machinery used, and the risks incident thereto: *Kain* v. *Smith*, 25 Hun 149.

A witness acquainted with plaintiff's physical condition, though not a physician, was permitted to testify, against the objection of the defendants, to the state of plaintiff's health before and after the accident, and, among other things, that he had since had a skin disease. As he merely stated facts within his observation, and expressed no opinion, the evidence was competent.

The application for a new trial on the ground of misconduct of the jury was made upon affidavits, which are met by counter-affidavits, and was thus determined upon conflicting evidence. It also appears that some of the affidavits on plaintiff's part are not returned to this court. We see no reason, therefore, for questioning the correctness of the decision of the trial court on this point: *Peterson* v. *Faust*, 30 Minn. 23. So, also, as respects the damages, which are claimed to be excessive; the question was within the province of the jury to determine; and considering the nature of the injury, the age of the plaintiff, extent of his disability and suffering, we are unable to say that the trial court erred in refusing to set aside the verdict for such cause.

Order affirmed.

MITCHELL, J., dissenting.—As I understand the facts of the case, the duty of these "car inspectors" was simply to make a general cursory examination of cars *en route*, upon the arrival at the yard, so as to detect any patent defects. Their duty was substantially

the same as that of local examiners, employed at certain intervals along the line of every railroad, who makes a like cursory examination of the cars of a train in transit. They are ordinary servants of the company, intrusted with no general control or discretion in the management of the company's business or any department, but simply charged with the performance of certain special executive duties in the matter of such local inspection. I think they were mere fellow-servants with those employed in running the trains or moving the cars.

There is much difference of opinion as to whether the doctrine of "common employment" works equitably, as applied to the large business enterprises of the present day, with their numerous departments and different grades of service. But the doctrine has become too thoroughly imbedded in the jurisprudence of England and this country to be disturbed by the courts. If it is to be changed, it must be by the legislature. It seems to me that the doctrine laid down in the opinion of the court in this case, if carried to its logical consequences, goes a long way towards breaking down this well-established rule, which exempts the master from responsibility for injuries to his servants caused by the negligence of their fellow-servants. This doctrine has been so much and so often considered in the books that it would be useless to enter upon any general discussion of it at this time. But it seems to me that confusion has sometimes arisen from a misapprehension or misapplication of certain maxims or rules bearing upon this subject.

It is often remarked that as corporations can only act through natural persons, who are all in a sense servants of the corporation, to hold general agents or superintendents, to whom is intrusted the management and control of its business, to be fellow-servants with all subordinate employees, would be to relieve the corporation of all liability for negligence. It seems sometimes to be inferred from this that a different rule as to such liability is to be applied to corporations from that applied to natural persons. I do not so understand it. In every business there must be some natural person to whom its management and control is intrusted, and who is therefore, if not the master in person, the representative of the master, and for whose acts the master is responsible. If a natural person intrusts the control and management of his business to an agent, such agent, is the *alter ego* of the master precisely as if the same thing be done by a corporation. The only difference is that

in the case of a corporation there must be such a representative, whereas in the case of a natural person there may not be, for he may manage his own business in person. But it seems to me that in either case, when the relation of the employee to the business and the master is the same, the same rule must be applied in determining whether he is the representative of the master or merely a fellow-servant as to other employees.

Again, a familiar rule is that the master is bound to use ordinary care in furnishing suitable and safe instrumentalities for the use of his servants. Included in this is that of maintaining them in a safe condition. *Repairing* is, in a sense, *furnishing.* And, as necessarily incident to the duty of "maintaining," is the duty of providing an adequate system of inspecting, examining and guarding these instrumentalities. It is also the rule that this duty of furnishing and maintaining safe instrumentalities is a primary duty of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty of making performance for him, but that the failure of such agent will be the failure of the master. This rule has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however subordinate his station, who is engaged in performing the most common executive duties in the matters of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details.

Of course, in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. But I have not found any case well considered, either upon principle or upon an examination of the authorities, which seems to me to carry the rule to any such length. I find no support for it in the English cases. The Supreme Court of Massachusetts, which is one of the few whose decisions on this question are anything like consistent, or seem to be governed by some uniform principle, has always held the master strictly to the performance of this primary

duty of exercising ordinary care in furnishing and maintaining safe instrumentalities for the use of his servants, and refused to permit him to shield himself behind the fact that he had clothed some general agent with the power, and charged him with the duty of performing it. This is illustrated by the case of *Ford* v. *Rd. Co.*, 110 Mass. 240, in which they held the company responsible for the negligence of the *master mechanic* in not repairing an engine, he having entire charge of that department of the business.

But the distinction which I have alluded to is distinctly brought out in the subsequent case of *Holden* v. *Railroad Co.*, 129 Mass. 268, in which the reasons and limits of the rule and the authorities on the subject are ably discusseed by GRAY, C. J., and in which it, is, in effect, held that a track repairer and a brakeman are fellow-servants. Almost as a corollary from this last decision followed that of *Mackin* v. *Railroad Co.*, 135 Mass. 206, which holds that a car inspector and a brakeman employed on the same car are fellow-servants,—a case entirely analogous to the present one.

I have not overlooked the fact that that was a foreign car in transit over the company's road. I also notice the *caveat* in regard to that which the court put into their opinion. But, whatever state of facts they might have had in mind in doing so, it could not have been anything affecting the principle involved in the present case; for it seems to me that this duty of casual inspection of cars while in transit must be the same, whether the car is a foreign one or a domestic one.

In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion. The primary character of the duty of the master to furnish safe instrumentalities is clearly and ably defined by FOLGER, J., in *Laning* v. *Railroad Co.*, 49 N. Y. 532. But the limits to the rule and the common misapprehension as to its application referred to, are very clearly brought out by ALLEN, J., in *Malone* v. *Hathaway*, 64 N. Y. 5. The distinction between a general agent intrusted with the control of some branch or department of the business, and who therefore represents the master, and a servant employed to perform some special duties or executive details in the same department, is also pointedly made by FOLGER, J., in *Slater* v. *Jewett*, 85 N. Y. 61. Neither of these cases has ever been questioned or criticised, although two or three late cases in the same court, which

seem not very carefully considered, appear to lay down a somewhat different rule, but without much discussion or reference to the authorities. This court has itself recognised the same distinction. In *Brown* v. *Minneapolis & St. L. Ry. Co.*, 31 Minn. 553, we held that a station agent who had general charge of the tracks in and about his station, and whose duty it was to keep them clear and in safe condition for passing trains, was a fellow-servant with an engineer on such a train. In *Roberts* v. *Railroad Co.*, 22 N. W. Rep. 389, decided at the present term, we held that a switch-tender and a baggage-master were fellow-servants. The *Drymala Case*, 26 Minn. 40, is not in conflict with this distinction. That case was decided upon the ground that the "section foreman," to whom was intrusted the duty of repairing or "furnishing" the track, was the representative of the master; and this was at the time, and is yet, generally considered what might be termed a "border case."

The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed "vice-principals," or representatives of the master, and those who are to be deemed "fellow-servants," as to other employees; but the fact of such a distinction is everywhere recognised. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching or guarding the instrumentalities used by other employees, would virtually abrogate the whole doctrine of "common employment." There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these "car inspectors" and switch-tenders, station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees.